

Number: **200952004**
Release Date: 12/24/2009
Index Number: 382.12-06

Department of the Treasury
Washington, DC 20224

[Third Party Communication:
Date of Communication: Month DD, YYYY]

Person To Contact: _____, ID No. _____

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PLR-100993-09

Date:
September 23, 2009

LEGEND:

Parent =

Day x =

Date 1 =

Date 2 =

Date x =

Year 1 taxable year =

$$V =$$
$$W =$$
$$X =$$
$$Y =$$

Class 1 CPS =

Class 2 CPS =

Class 3 CPS =

Class 4 CPS =

Class 5 CPS =

Class 6 CPS =

Class 7 PS =

Class 8 PS =

Class 9 PS =

Penny Warrants =

Investor =

Stock Splits =

Reorganization =

Dear :

We respond to your letter dated December 30, 2008, and subsequent correspondence dated April 27, 2009, June 30, 2009, July 16, 2009, August 10, 2009 and September 23, 2009 (collectively "the Submissions") in which you requested rulings as to certain federal income tax consequences of the transactions discussed below.

The rulings contained in this letter are based on facts and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. This office has not verified any of the materials submitted in the

support of the request for rulings. Verification of the information and other data may be required as part of the audit process.

FACTS

Parent is the common parent of an affiliated group of corporations ("Parent Group") that join in filing a consolidated return for federal income tax purposes. Parent has a 52/53 week taxable year ending on Day x. Parent was incorporated on Date 1 (over 10 years ago). Parent Group has been a loss group within the meaning of §1.1502-91(c) of the Income Tax Regulations since inception. Parent Group (the "Taxpayer") is requesting a ruling that it may, under the "Hold Constant Principle" factor out changes in proportionate ownership of Taxpayer's stock which are attributable solely to fluctuations in the relative fair market values of different classes of stock under section 382(l)(3)(C) to determine the increase in percentage ownership of each of its 5-percent shareholders on each of its testing dates since inception and identify which such testing dates are change dates for purposes of section 382. The Hold Constant Principle is as follows:

On any testing date, in determining the ownership percentage of any five percent shareholder, the value of such shareholder's stock, relative to the value of all other stock of the Taxpayer, shall be considered to remain constant since the date that shareholder acquired the stock; and the value of such shareholder's stock relative to the value of all other stock of the Taxpayer issued subsequent to such acquisition date shall also be considered to remain constant since that subsequent date.

Taxpayer has preliminarily indicated (subject to further refinement) its belief that—(i) applying the Hold Constant Principle, it has experienced V ownership changes and would have an owner shift of approximately W percent on Date 2, and (ii) applying the methodology set forth at §§1.382-2(a)(3)(i) and 1.382-2T(c)(1), it has experienced X ownership changes and would have an owner shift of approximately Y percent as determined on Date 2. Taxpayer has provided a listing/description of what it currently believes to be every relevant transaction involving Parent stock since inception for purposes of determining owner shifts under section 382 (approximately 100 transactions).

Taxpayer's Year 1 taxable year is a taxable year for which the statute of limitations on assessment and collection has expired ("Closed Year"), as are all preceding taxable years. As of the date of issuance of this letter, Taxpayer's succeeding taxable years are not Closed Years.

REPRESENTATIONS

The taxpayer makes the following representations:

1. Parent Group has been a loss group within the meaning of §1.1502-91(c) since inception. To the best of the Taxpayer's knowledge, its amount of tax liability on any of its federal income tax returns filed to date would not be affected by whether or not it takes into account the effect of fluctuations in the relative values of different classes of stock for purposes of determining owner shifts and ownership changes under section 382.
2. No share of common stock (which includes, for this purpose, the Penny Warrants), Class 1 convertible preferred stock ("CPS"), Class 2 CPS, Class 3 CPS, Class 4 CPS, Class 5 CPS, Class 6 CPS, Class 7 preferred stock ("PS"), Class 8 PS, and Class 9 PS (collectively, the "Equity") has been redeemed since Taxpayer's inception (with the exception of redemptions triggered by the cashless exercises of Penny Warrants and the redemption of Class 3 CPS held by Investor on Date x).
3. No share of the Equity meets the description of stock in section 1504(a)(4). Accordingly, each share of the Equity constitutes stock for purposes of section 382.
4. The fair market value of the common stock exchanged in the Stock Splits was approximately equal to the fair market value of the common stock received in exchange therefor.
5. In each of the recapitalizations involving any share of the Equity (whether involving a conversion or exchange) as described in the Submissions, including the Reorganization, the fair market value of the stock of Taxpayer exchanged was approximately equal to the fair market value of the stock of Taxpayer received in exchange therefor.
6. To the best of the knowledge of the Taxpayer, there have been no distributions to its shareholders or to any of its security holders other than in the normal course of business.
7. Since Taxpayer's inception, Taxpayer has had no warrant or option outstanding with an exercise price substantially less than the fair market value of the underlying stock on the date of grant, other than the Penny Warrants.

RULINGS

Based solely on the information submitted and representations made, we hold as follows:

1. For purposes of factoring out changes in proportionate ownership of Parent's stock that are attributable solely to fluctuations in the relative fair market values of different classes of stock under §382(1)(3)(C), Taxpayer may apply a method employing the Hold Constant Principle to determine the increase in percentage ownership of each of its 5-percent shareholders on each of its testing dates since inception (and to identify which such testing dates are change dates for purposes of section 382), provided that—

(i) Taxpayer takes a return position consistent therewith on its tax return for its first taxable year ("First Taxable Year") in which the application of said method would affect the amount of its taxable liability, and (ii) if employment of said method does not result in an ownership change during said First Taxable Year, Taxpayer continues to apply said method thereafter through the testing date on which said method first results in an ownership change. Thereafter, Taxpayer may continue to apply the same method, under the same terms and conditions.

2. In applying the Hold Constant Principle, a value-for-value recapitalization or conversion of stock of Taxpayer into other stock of Taxpayer shall be disregarded, and the exchanging shareholder shall be considered to have acquired such newly issued stock as of the date it acquired the stock exchanged therefor.

CAVEATS

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed as to whether or not—(i) Taxpayer had a testing date on any given date, (ii) Taxpayer had an ownership change on any testing date, (iii) any exchange of stock pursuant to a recapitalization or a conversion represented a value for value exchange, or (iv) any warrants or options should have been treated as exercised under §1.382-4(d). One or more rulings given in this letter deal with issues that may be addressed in subsequent published guidance. See section 11 of Rev. Proc. 2009-1, 2009-1 I.R.B. 1, 47-51, regarding the circumstances, including published guidance, which may result in the revocation or modification of a letter ruling.

PROCEDURAL STATEMENTS

This ruling letter is directed only to the taxpayers who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, any taxpayer filing its return electronically may satisfy this requirement by attaching a statement to the return that provides the date and control number of this letter ruling.

In accordance with the power of attorney on file in this office, a copy of this ruling letter will be sent to your authorized representative.

Sincerely,

Mark S. Jennings
Branch Chief, Branch 1
Office of Associate Chief Counsel (Corporate)